

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY MARQUETTE MCNEAL,

Defendant-Appellant.

UNPUBLISHED
February 10, 2005

No. 248323
Kent Circuit Court
LC No. 02-03001-FH

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). Defendant was sentenced to a prison term of 12 to 180 months. We reverse and remand for entry of a judgment of acquittal.

I

Defendant was employed as a high school wrestling team coach for the 2000-2001 and 2001-2002 school years. The complainant, born on March 15, 1985, was a member of the wrestling team¹ during the 2000-2001 school year, but not during the 2001-2002 school year. Instead, during the 2001-2002 school year, complainant was a cheerleader for the basketball team and maintained contact with the wrestling squad by acting as the wrestling team's unofficial assistant manager on a volunteer basis.

Defendant's conviction arises from an incident that occurred on November 7, 2001. After a wrestling practice and on school premises, defendant orally penetrated the complainant's vagina during a sexual encounter. Defendant was charged with one count of CSC III as a result of this incident.² At trial, the complainant testified that defendant was the wrestling coach, and that she and defendant had engaged in oral-vaginal sex. The complainant was not asked to

¹ The high school did not have separate boys and girls wrestling teams

² During trial, the complainant testified that she and defendant had had an additional sexual encounter in the football office, but this alleged incident was denied by defendant and was not charged by the prosecution.

characterize whether her participation in the sexual encounter was consensual or coerced. Similarly, defendant testified that he was the wrestling coach and that he had engaged in oral-vaginal sex with the complainant. Like the complainant, defendant was not asked any other questions about the nature of the sexual encounter.

During closing arguments, the prosecution argued that it had proven defendant's guilt of CSC III beyond a reasonable doubt, on the basis that the evidence established penetration and coercion to accomplish the penetration. The prosecution, relying on *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995), argued that, as a wrestling coach, defendant held a position of authority over the complainant, that the evidence supported the finding beyond a reasonable doubt, and that, specifically because defendant was a person of authority, complainant's participation in the sexual encounter with the defendant occurred only as a result of coercion implicitly applied by defendant. Defendant asserted that there was no evidence on the record that the complainant engaged in the sexual encounter against her will, that the proofs failed to establish actual or implied coercion beyond a reasonable doubt, and that, therefore, he was entitled to a judgment of acquittal. The trial court convicted defendant as charged, finding that "defendant's actions constitute coercion [of the complainant] because of his position of authority over the complainant." Defendant now appeals.

II

In a bench trial, the trial court must make findings of fact and state separately its conclusions of law. MCR 6.403. Findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. MCR 2.517; *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). We review a trial court's findings of fact for clear error and conclusions of law de novo. MCR 2.613(C).

In reviewing the sufficiency of the evidence to support a conviction, we review the evidence de novo in the light most favorable to the prosecution to decide whether a rational factfinder could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

III

Defendant argues the evidence was insufficient to establish that the complainant engaged in the sexual encounter with him because of coercion within the meaning of MCL 750.520d(1)(b), and that therefore his conviction of CSC III cannot be sustained. We agree.

In order to convict defendant of CSC III, the prosecution was required to prove beyond a reasonable doubt that defendant engaged in sexual penetration, accomplished through the use of force or coercion. *People v Petrella*, 424 Mich 221, 239; 380 NW2d 11 (1985). Under MCL 750.520d(1)(b), coercion may be actual, as where physical force is used to compel one to act against one's will, or constructive, as where one is constrained by subjugation to do what his free will would refuse. *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995). "[T]he existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence." *Id.* at 410.

The trial court's finding that implied coercion had been established, based solely on the evidence that complainant engaged in the sexual encounter with defendant and that defendant held a position of authority over the complainant, is clearly erroneous. In *People v Perkins*, 468 Mich 448, 453-455; 662 NW2d 727 (2003), our Supreme Court affirmed the district court's dismissal of a charge of first-degree criminal sexual conduct. The Supreme Court concluded that the evidence that the defendant was a deputy sheriff who held a position of authority over the sixteen-year-old complainant, together with the evidence that a child can be psychologically subjugated to sexual advances by a person of authority, was insufficient to show that the complainant in that case was subjected to an implied coercion where there was also evidence that the sexual relationship between the complainant and the defendant was consensual. Importantly, the Supreme Court concluded that "[i]f it were true that the complainant's actions were the result of defendant's subjugation of her will, then . . . the prosecutor failed to present evidence of it." *Id.* at 454.

We reach the same conclusion in this case. As is apparent from the record, even when viewed in the light most favorable to the prosecution, the limited examination of the complainant and defendant conducted by the prosecution, defense counsel and the trial court established no more than that a sexual penetration had occurred, and that defendant held a position of authority over complainant. The evidence did not establish how defendant used his position of authority to coerce the complainant to engage in the sexual encounter; in other words, there is no evidence that the complainant was coerced to engage in sexual relations with defendant *because of* his position of authority. The trial court's finding in this regard was pure speculation. Accordingly, we conclude, on the basis of *Perkins, supra*, that the prosecution failed to prove beyond a reasonable doubt that the sexual penetration in this case was accomplished through force or coercion, and that defendant's conviction must be reversed.

Reversed and remanded for entry of a judgment of acquittal. See *People v Randolph*, 466 Mich 532, 552 n 24; 648 NW2d 164 (2002) (double jeopardy principles bar retrial after a finding of insufficient evidence on appeal). We do not retain jurisdiction.³

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

³ In light of our conclusion, *supra*, that the evidence was insufficient to sustain defendant's conviction under an implied coercion theory, we need not address defendant's remaining argument.